

BEFORE THE JOINT SHORELINES HEARINGS BOARD
AND THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

P.R.O.W. (Protecting and Restoring
our Waterfront), WASHINGTON
ENVIRONMENTAL COUNCIL, and
ROBERT TURPIN,

Appellants,

v.

CITY OF OLYMPIA, PORT OF OLYMPIA,
STATE OF WASHINGTON, DEPARTMENT OF
FISHERIES, DEPARTMENT OF GAME and
DEPARTMENT OF ECOLOGY,

Respondents.

SHB No. 225
SHB No. 225-A
PCHB No. 1032

ECPA No. 5
FINAL
FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

I. HEARING

A hearing in these consolidated matters, appeals from final decisions rendered pursuant to an Environmental Coordination Prodecures Act (ECPA) master application, was held in Olympia, Washington on November 8, 10, and 12, 1976. Pursuant to RCW 90.62.080(1), the City of Olympia's final decision approving a substantial development permit for the Port of Olympia project was reviewed by the Shorelines Hearings

1 Board: Art Brown (Chairman), Chris Smith, W. A. Gissberg, Robert F.
2 Hintz, Robert E. Beaty, and Howard L. Stolaas. The ECPA final decisions
3 rendered by the Department of Ecology (Sewage and Industrial Waste
4 Treatment Facilities Approval and Waste Discharge Permit) and the
5 Departments of Fisheries and Game (Hydraulic Project Approval), were
6 reviewed by the Pollution Control Hearings Board: Art Brown (Chairman),
7 Chris Smith, and W. A. Gissberg. Ellen D. Peterson presided throughout
8 the consolidated hearing.

9 Appellants, Robert Turpin and P.R.O.W., et al., were represented
10 by Herbert H. Fuller; Ernest L. Meyer appeared for Respondent City of
11 Olympia; Assistant Attorney General Robert V. Jensen appeared for
12 Respondent Department of Ecology; Assistant Attorney General Dennis
3 Reynolds represented the Departments of Fisheries and Game.

14 It had been ruled in pre-hearing that the review of ECPA 5 by
15 the Pollution Control Hearings Board and the Shorelines Hearings Board
16 would be as provided in RCW 34.04.130, incorporated by reference in
17 RCW 90.62.080(1). That is, the Boards would not conduct a de novo
18 hearing but would limit their review to the record below, oral argument,
19 and consideration of written briefs. However, prior to argument, the
20 parties orally stipulated to opening the record to additional testimony,
21 a stipulation accepted by the Board.

22 II. BACKGROUND

23 The hearing on ECPA 5 was the first hearing ever held by the joint
24 Board on final decisions rendered responsive to a master application
25 filed pursuant to the Environmental Coordination Procedures Act. The

6
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1 basic purposes of ECPA, as expressed in the legislative findings¹ were to:

2 1. Provide an optional coordinated procedure for an applicant
3 whose project required two or more permits.

4 2. Provide the public an "easier opportunity to present their
5 views comprehensively" on proposed uses of natural resources and
6 environmental concerns,

7 3. Provide developers a "greater degree of certainty" with
8 regard to permit requirements, and

9 4. Improve information and coordination in land use decisions
10 among state and local agencies.

11 On November 7, 1974, the Port of Olympia filed a master application
12 with the Department of Ecology pursuant to RCW 90.62.040(1) seeking
13 necessary approvals and permits for its East Bay Marina Development
14 Project. "Final decisions" responsive to this master application were
15 transmitted by the Department of Ecology on August 11, 1975, from
16 which appeals were filed by the instant Appellants with the Shorelines
17 Hearings Board and the Pollution Control Hearings Board on September 11,
18 1975. Following three pre-hearings, an Order of Remand and Dismissal
19 was issued by the Boards on January 6, 1976, citing a need for (a)
20 refining the parameters of the project, (b) identifying the state
21 agencies with applicable permit requirements, and (c) improving the
22 "record below" in this matter.

23 Upon reprocessing of the master application, "final decisions"
24 were made by (1) the City of Olympia - substantial development permit

25

6 1. RCW 90.62.010.

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1 approved subject to conditions, (2) State Department of Ecology - Sewage
2 and Industrial Waste Treatment Facilities Approval and Waste Discharge
3 Permits approved subject to conditions, (3) State Department of
4 Fisheries and Game - hydraulic project approved subject to conditions,
5 and (4) State Parks and Recreation Commission approved the project without
6 conditions. These final decisions were transmitted by the Department
7 of Ecology pursuant to RCW 90.62.060(6) on May 4, 1976. Appellant
8 Robert Turpin appealed the decision of the City of Olympia to issue a
9 substantial development permit. Appellants P.R.O.W., et al., cited as
10 Respondents all state agencies granting permit approvals as well as
11 the Department of Natural Resources which had responded negatively to
12 the project's need for an ECPA permit from its agency.

13 On July 14, 1976, the appeal as to the approval by the State Parks
14 and Recreation Commission was withdrawn by Appellant. The Department
15 of Natural Resources was dismissed by the hearing officer as a party
16 respondent for lack of jurisdiction.²

17 III. ORDERS

18 The Findings, Conclusions of Law and Order infra relative to the
19 issuance of the substantial development permit is the decision of the
20 Shorelines Hearings Board. The Findings, Conclusions of Law and Orders
21 infra affirming the final decisions of the Department of Ecology and
22 the Departments of Fisheries and Game are the actions of the members of
23 the Pollution Control Hearings Board.

24
25 2. See RCW 90.62.060(4), 90.62.070, and 90.62.080(1) and
26 WAC 173-08-030 DEFINITIONS . . . (4) "Permit" . . . Department of
Natural Resources

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SHB No. 225
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ECPA No. 5

FINDINGS OF FACT,
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FINDINGS OF FACT

I

Application No. SH-OLY-2-75 seeking a substantial development permit for the East Bay Marina Development Project was filed by the Port of Olympia with the Olympia City Commission on March 7, 1975. A revised project description prepared pursuant to the Order of Remand, discussed supra, became the substance of such application with the original filing number and date retained. The reissued "ECPA Project

1 Description," incorporated by reference in the application, described
2 the development at issue as follows:

3 1. The dredging of 58 acres of East Bay tidelands and bottom
4 lands to create:

5 - a 19-acre waterway and turning basin approximately 7,200 feet
6 long, 100 feet wide, to a depth of 15 feet below Mean Lower Low Water
7 (MLLW) and

8 - a 39-acre, 800 boat capacity moorage basin to a depth of
9 12 feet below MLLW.

10 2. Placement of the resultant dredge spoils behind granular
11 containment berms to create approximately 54.9 acres of landfill.

12 Specifically, the landfill area is to accommodate:

13	Cargo backup	29.3	acres
14	Launch ramp parking.....	2.6	"
15	Launch services.....	.7	"
16	Marina parking with		
17	seawall walkway.....	7.9	"
18	Adjacent roadway.....	2.8	"
19	Marina services and water-		
20	oriented commercial units.....	8.7	"
21	Olympia Avenue access road.....	2.9	"

22 TOTAL 54.9 acres

23 The 10 acre fill at the south end of East Bay, originally proposed
24 for a boatel/office area, was eliminated.

25 II

26 The East Bay Marina Development was proposed as the first stage of
27 improvements consistent with the Comprehensive Plan for Utilization of
Olympia Harbor, adopted by the Olympia Port Commission in August, 1974
and incorporated as part of the City of Olympia's Comprehensive Plan.
As stated in the project's Final Environmental Impact Statement, page

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1 the purposes of the Stage 1 development are to "fulfill latent
2 community and regional needs for water-oriented recreational facilities
3 and to provide the land area necessary to maximize the utilization of
4 the existing ocean berthage in Olympia Harbor."

5 III

6 The substantial development permit was approved by the City
7 Commission on April 30, 1976. Under the instant permit, the Port of
8 Olympia is authorized to dredge and fill the requested acreage, construct
9 roadways as aligned (see Exhibit RP-1) and establish a moorage basin for
10 a maximum of 800 boats. The permit does not authorize construction of
11 any specific structure other than the moorages. Marina commercial uses
12 as suggested on the project's Stage 1 plans, for example, will require
13 a separate substantial development permit if construction of these
14 projected uses is undertaken.³

15 The permit as approved is subject to the following conditions:

- 16 1. Final design approval by the U. S. Corps of Engineers
and to granting of other applicable permits.
17 2. Sufficient areas must be set aside for expansion of
the existing sewage plant, as determined by the City of Olympia
18 and the Port officials. It is expected that the City would
purchase the area in the future.
19 3. As suggested in the Dames and Moore Soils Report,
protection for the cut and filled areas shall be placed as
20 necessary. Full protection will not be required if the boat
and speed limit is held at 4 m.p.h.
21 4. Detailed plans for each phase of construction
regarding conformance to the Master Program and conformance
22 with the approved shoreline permit.
23 5. The types of marina commercial services shall be
limited to those which are water-dependent or water-oriented
shown on the attached plan.
24 6. All storm water run-off shall be handled in such a
manner that all foreign materials will be removed prior to
25 the water entering the bay.

6
27 3. See, e.g., Wolpehr, et al. v. Kittitas County and Pat Keating,
SHB 103, 103-A, 103-5, 103-C, and 103-E.

7. Rezoning consistent with the proposed uses of the project area be accomplished.

8. The existing platted channel and harbor lines be vacated and a waterway be established consistent with the finalized plan.

IV

The project site is located in Olympia Harbor at the southern terminus of Puget Sound. The site is bordered on the north by Budd Inlet, on the south by State Avenue, on the east by the east shoreline of East Bay, on the west by the existing harbor peninsula. The site lies within Sections 11 and 14, Township 18 north, Range 2 east of the Willamette meridian, in Thurston County, Washington.

The 85 acres of upland on the harbor peninsula now support a variety of water-dependent and non-water related functions under the direct control of or lease from the Port of Olympia. The East Bay area which is to be dredged was formerly used to store log rafts for export; at present, East Bay attracts little human activity and presents at low tide an unsightly vista of heavily polluted mud flats littered with piling remnants and chunks of cement. (See Exhibit RP-14 a-c).

V

The project site is currently zoned heavy industrial (HI), under the City of Olympia Zoning Ordinance, Section 12.03.161. The extent of the project authorized under the instant substantial development permit, as described in Finding of Fact III, is consistent with the existing zoning designation.

Under Olympia's Shoreline Master Program in effect during the processing of the instant application and as approved by the Department of Ecology on May 21, 1976, the project is within the "Urban

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1 Environment."⁴ Out of the 107 miles of shoreline in Thurston County, only
2 7.7 miles are designated for urban use, most of which are located
3 within the Olympia harbor.

4 While not before the Board for review, it should be noted that
5 alterations in the harbor lines will be necessary, as noted on
6 Exhibit RP-4, prior to development.

7 VI

8 The Port of Olympia now has three berths available for ocean going
9 vessels. The cargo backup area now existing on the 85-acre harbor
10 peninsula is approximately 40 acres. The ratio of cargo backup area to
11 ship berths recognized as desirable in the shipping industry is 25-30
12 acres per berth. The proposed development would increase the cargo area
13 to approximately 70 acres. Thus, to the extent that the cargo handling
14 area of the Port is increased, there will be less justification for
15 similar developments elsewhere in the County. For additional backup
16 acreage, the Port now relies on land available at its airport facility
17 located five miles from the harbor, an arrangement which requires double
18 handling of the logs so stored.⁵

19
20 4. "Urban Environment" designates shorelines within urbanized
21 areas which provide for intensive public use and which are developed
22 in a manner that enhances and maintains shorelines for a multiplicity
23 of urban uses. This environment is characterized by high-intensity
24 land and water use, visually dominated by man-made residential,
commercial and industrial structures and developments. Both renew-
able and nonrenewable resources are fully utilized, and public access
and recreation encouraged to the maximum compatible with the other
activities designated in the environment. p. 12.

25 5. For both economic and ecological reasons, the storing of logs
26 by rafting decreased from 68.3% in 1961-67 to 30.2% during the years
1967-75. Airport storage currently accounts for approximately 33% of
logs exported with the backup area on the Port harbor site handling 36.8%.

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1 In general, significant continuing increases in foreign trade through
2 the ports of Puget Sound are forecast. Nonetheless, it does not appear
3 that future commerce in raw logs, the bulk of the Port of Olympia's
4 exports (approximately 99 percent of its tonnage), will exceed current
5 levels.

6 However, technological advances related to the handling of
7 conventional cargo by means of containers and the increase in ship size
8 require larger cargo holding areas than before.

9 VII

10 It is contemplated that one-half of the proposed 800 moorages will
11 be covered and one-half will be open. The size of the marina was
12 determined by the Port on the basis of recent boat registrations, studies
13 of boat traffic in Puget Sound and an assessment of the Olympia area's
14 need for such a facility.

15 VIII

16 The access road authorized under the permit will require a one-acre
17 filling of the southern tip of East Bay, thus permitting the extension of
18 existing Olympia Avenue easterly to connect with East Bay Drive/Plum
19 Street. This is intended to divert the heavy logging trucks from roads
20 approaching the central business district. In testimony before the
21 Shorelines Hearings Board, a Port Commissioner confirmed that he had been
22 concerned that the alternate route favored by Appellants, an extension of
23 Cherry Street, would have an adverse effect on businesses within a
24 building which he owned during the preparation and processing of the
25 permit application. Adoption of the Cherry Street alternative would
26 eliminate the proposed road fill and allow utilization of existing

1 streets.

2 IX

3 Because East Bay is located at the southern end of Puget Sound,
4 flushing action therein is limited. In addition, sewage outfall has
5 been a problem in the area. These difficulties are anticipated and met
6 in the issued permit. Condition one of the substantial development
7 permit subjected approval of the substantial development permit to the
8 "granting of other applicable permits." One such permit is the
9 Hydraulics Project Approval given by the Departments of Fisheries and
10 Game. Conditions of the Hydraulic Permit require:

11 1. No dredging for the entrance channel or moorage area
12 may occur unless assurances are made that all sewage entering
Olympia Harbor is within 12 months of achieving secondary
treatment . . .

3 2. During the entire marina construction period, agreed
14 on mechanical flushing devices shall be available to insure
maintenance of water quality in East Bay acceptable to
salmonid survival . . .

15 3. No boat moorage will be permitted prior to secondary
sewage treatment completion. (Emphasis added).

16 4. Permanent approved mechanical flushing devices shall
17 be provided to exchange the entire volume of East Bay every
18 tide cycle if water quality fails to meet Class B standards,
or better, following completion of the marina and the secondary
sewage treatment.

19

20 X

21 Olympia's City Engineer predicts that such secondary treatment
22 facilities will be completed by 1980.

23 X

24 The dredging of the channel as proposed is consistent with
25 recommendations made by soils consultants both in slope configuration
6 and distance from the East Bay Drive roadway. No impairment of

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1 lateral support is foreseen.

2 XI

3 Appellant Turpin's view of East Bay and that of the public using East
4 Bay Drive will clearly be a different one with the development in place
5 than it is at present. The expanse of water, mud flats and abandoned
6 pilings now visible will be replaced by covered and uncovered moorages,
7 a cargo yard and a diminished expanse of water.

8 XII

9 Various birds can be sighted in East Bay. In two hours, for
10 example, an experienced observer recently noted close to 1,500 birds,
11 including 600 seagulls and over 100 additional waterfowl. Many of these
12 birds would be displaced by the fill and operation of the marina.

13 XIII

14 A draft Environmental Impact Statement (EIS) for the proposed East
15 Bay Marina Development was completed and circulated on August 27, 1974.
16 The final EIS was prepared and distributed on February 28, 1975.
17 Changes responsive to environmental concerns expressed in the final EIS
18 were made in the project authorized under the instant substantial
19 development permit.

20 XIV

21 Any Conclusion of Law hereinafter stated which may be deemed a
22 Finding of Fact is hereby adopted as such.

23 From these Findings the Shorelines Hearings Board comes to these

24 CONCLUSIONS OF LAW

25 I

26 Appellants allege that the decision of the City Commissioners to

27 FINDINGS OF FACT,
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1 issue a substantial development permit for the proposed project is
2 invalid because the appearance of fairness doctrine has been violated.⁶
3 For the Board to void the action of the City of Olympia on this basis
4 it would have to:

5 1. determine that the facts presented in this case constitute a
6 violation of the doctrine by said Port Commissioners, and

7 2. conclude that any infirmity in the design of the project
8 resulting from such a violation infects and nullifies any action taken
9 thereon by any other agency, i.e., the City of Olympia.

10 Even though the appearance of fairness doctrine covers Port
11 Commissioners in other contexts, it does not apply in this case. All
12 applicants for shoreline development projects are assumed to be
13 self-serving. The project had merit to the City Commissioners unrelated
14 to any personal concern which might have influenced an individual Port
15 member in designing the project.

16 It must be stressed that it is the decision of the City of Olympia
17 which is before the Board for review. Nothing in the record suggests
18 that the City Commissioners either individually or as a body violated
19 the appearance of fairness doctrine in their consideration of the
20

21 6. "This doctrine has been developed to preserve the highest public
22 confidence in those government processes which bring about zoning changes
23 or which formulate property use and land planning measures." Swift v.
Island County, 87 Wn.2d 348, 361, ___ P.2d ___ (1976).

24 "Under that principle, members of commissions having the
25 role of conducting fair and impartial fact-finding hearings must, as
26 far as practicable be objective, be free of entangling influence, and
27 execute their duties with the appearance as well as the reality of
28 fairness." King Co. Water Dist. v. Review Bd., 87 Wn.2d 536,
29 541 ___ P.2d ___ (1976).

30
31 FINDINGS OF FACT,
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1 proposed project.

2 II

3 There is no merit in Appellant's contention that the standard of
4 review provided under the Shoreline Management Act,⁷ is applicable
5 to an appeal of a substantial development permit issued under the
6 Environmental Coordination Procedures Act.

7 The filing with either the Pollution Control Hearings Board or
8 the Shorelines Hearings Board of an appeal of a final decision
9 rendered responsive to an ECPA master application must be reviewed
10 pursuant to the Environmental Coordination Procedures Act:

11 RCW 90.62.080 Department review--Judicial review. (1)
12 Any person aggrieved by any final decision contained in the
13 document issued by the department pursuant to RCW 90.62.060(6)
14 may obtain review thereof by filing a request, with the
15 board, within thirty days of the transmittal under
16 RCW 90.62.060(6) by the department of ecology of the document,
17 for all final decisions other than a final decision relating
18 to the granting or denial of a substantial development permit
19 pursuant to RCW 90.58.140 in which case the filing of such
20 request shall be with the shorelines hearings board . . . The
21 scope of review by the boards and the standards of reviews
22 used by the boards for determining the validity of any final
23 decision shall be those contained in RCW 34.04.130.

24 RCW 90.62.090 Application, scope, construction of
25 chapter--Continuation of fee schedules. Notwithstanding any
26 other statutes relating to the processing of application for
27 permits, the procedures, including timing requirements and
approval requirements related thereto, set forth in this
chapter shall be exclusive in relation to applications for
permits filed pursuant to RCW 90.62.040. The procedures of

28 7. That Act does not deal with the standards of review, as such,
29 of this Board. Rather, it merely subjects our review procedures to those
30 prevailing in contested cases under RCW 34.04. See RCW 90.58.180(3).
31 The Board has adopted rules establishing its standard and scope of
32 review, WAC 461-08-175. Such have been implicitly approved in Dept. of
Ecology v. Ballard Elks, 84 Wn.2d 551. However, the scope and standard
33 of review for this Board under ECPA are different from those provided
34 under SMA.

35 FINDINGS OF FACT,
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1 this chapter shall be in lieu of any procedures otherwise
2 provided by statute, existing or hereafter enacted, to be
3 followed by a state agency in ruling upon an application
for a permit for a project under this chapter. (Emphasis
added)

4 The Environmental Coordination Procedures Act gives an
5 applicant the option of seeking multiple required permits individually
6 or filing one master application under the provisions of the Environ-
7 mental Coordination Procedures Act. Once a master application is
8 filed, the provisions of the Environmental Coordination Procedures Act
9 control. An aggrieved party cannot invoke the provisions of the
10 Shoreline Management Act rather than the Environmental Coordination
11 Procedures Act by the simple expedient of appealing only that final
12 decision which granted a shoreline permit and no other. Nor can the
13 Shorelines Hearings Board amend, by accepting Appellants' contention,
14 legislative language which is clear and unambiguous.

15 III

16 For its standards of review, the Environmental Coordination
17 Procedures Act incorporates by reference the provisions of
18 RCW 34.04.130(6):

19 The court may affirm the decision of the agency or
20 remand the case for further proceedings; or it may reverse
21 the decision if the substantial rights of the petitioners
may have been prejudiced because the administrative findings,
inferences, conclusions, or decisions are:

- 22 (a) in violation of constitutional provisions; or
- 23 (b) in excess of the statutory authority or jurisdiction
of the agency; or
- 24 (c) made upon unlawful procedure; or
- 25 (d) affected by other error of law; or
- (e) clearly erroneous in view of the entire record as
submitted and the public policy contained in the
act of the legislature authorizing the decision or
order; or
- 3 (f) arbitrary or capricious.

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1 The City's granting of the substantial development permit did
2 not violate constitutional provisions, exceed statutory authority, or
3 result from unlawful procedure. Nor does the record support a
4 conclusion that the City acted arbitrarily or capriciously in approving
5 the project.

6 To reverse the decision of the City therefore, the Shorelines
7 Hearings Board must find that the City's decision was "clearly
8 erroneous" in view of the record established and the legislative purposes
9 of both the Shoreline Management Act and the Environmental Coordination
10 Procedures Act.

11 The clearly erroneous standard, as repeatedly stated by the
12 Washington Courts,⁸ requires that the reviewing court, herein the
13 Shorelines Hearings Board, be left with the definite and firm conviction
14 that a mistake has been made, despite there being evidence in the record
15 to support the challenged administrative decision.

16 IV

17 In reaching its decision, the City of Olympia was required to
18 determine if the development proposed was consistent with: (1) the
19 policies and other provisions of the Shoreline Management Act, (2) the
20 guidelines and regulations of the Department of Ecology, and (3) the
21 City of Olympia's master program "as far as [could] be ascertained."⁹
22 Upon the addition of a condition suggested by us, we conclude that the
23

24 8. See, e.g., Ancheta v. Daly, 77 Wn.2d 255, 461 P.2d 531 (1969),
25 Dept. of Ecology v. Ballard Elks, 84 Wn.2d 551, 527, P.2d 1121 (1974);
Hayes v. Yount, 87 Wn.2d 280 (1976).

26 9. RCW 90.58.140(2).

1 development has such consistency.

2 V

3 The City's acceptance of the need for Port expansion as proposed
4 appears reasonable on the facts presented; such an increase in backup
5 area for ocean bound cargo is supportive of a water-dependent use and
6 is permitted within the "Urban Environment".

7 The establishment of a water-dependent marina facility to serve a
8 perceived public need for same is responsive to the Shoreline Management
9 Act's recitation of policies and preferred uses of shoreline sites.

10 Creation of public restrooms and a seawall walkway the length of
11 the peninsula should increase public access to and enjoyment of the
12 shoreline, another basic intent of the Shoreline Management Act.

13 The dredging of East Bay as conditioned under the substantial
14 development permit as modified by this Order and the hydraulic permit
15 is consistent with control of pollution and prevention of damage to the
16 natural environment.

17 VI

18 The Board does have some concern with the filling of the southern
19 end of East Bay to provide a traffic access to and from the harbor
20 peninsula. However, the acreage at issue (approximately one acre) is
21 minimal, the aesthetics of the shoreline will be improved by the fill,
22 the City's rationale for the route--diverting heavy truck traffic from
23 the downtown area--is sound planning, and in addition the road is designed
24 to facilitate access and egress for a water-dependent use. More
25 importantly, the sediment of East Bay is heavily polluted and unfortu-
26 nately, it appears that there is little likelihood of either the City or

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1 Port attempting to abate such polluted sediment. Nor is there any proof
2 that restoration is either technologically nor economically feasible.
3 Thus, we cannot, even if it were our preference to do so, require that
4 the East Bay sediment and shoreline be restored to its original condition.

5 Therefore, upon assessing the uses and projected impacts of the
6 proposal, this Board is not convinced that the City of Olympia erred in
7 concluding that the project, as conditioned, is consistent with the
8 statutory criteria.

9 VII

10 RCW 90.62.100(1) provides that

11 No master application . . . shall be processed . . .
12 unless it is accompanied by a certification from the
13 pertinent local government that the project is in
14 compliance with all zoning ordinances and associated
15 comprehensive plans

16 The instant master application was so certified. Those elements
17 of Stage 1 of the East Bay Marina Development which are authorized
18 under the instant substantial development permit, i.e., "the project"
19 for purposes of this section, were in conformity with applicable zoning
20 ordinances and comprehensive plans; appellants' challenge to the
21 validity of the certification in this instance is without merit.

22 VIII

23 The EIS prepared for this proposal was adequate in quantity and
24 quality to meet the need of a decision maker to inform himself of the
25 environmental impacts of the proposed action. The Board would further
26 note that mitigative modifications to a project which are made
27 responsive to environmental concerns expressed in an Environmental
28 Impact Statement are testimony to the efficacy of an EIS as a tool

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1 for enlightened decision making; such responsive modifications, made
2 after issuance of a final EIS, do not necessitate the preparation of a
3 second or supplemental Environmental Impact Statement.

4 IX

5 Any Finding of Fact which should be deemed a Conclusion of Law
6 is hereby adopted as such.

7 Therefore, the Shorelines Hearings Board issues this

8 ORDER

9 The final decision of the City of Olympia granting a substantial
10 development permit to the Port of Olympia, with conditions, is affirmed
11 subject to the following additional condition:

12 1. The Port of Olympia is to require in its leases for moorage
13 slips that any boat therein must be in conformity with the U. S. Coast
14 Guard and Environmental Protection Agency and Department of Ecology
15 rules with respect to waste disposal facilities.

16 The permit is remanded to the City of Olympia for action consistent
17 with this Order.

18 DATED this 21st day of January, 1977.

19 SHORELINES HEARINGS BOARD

20 Art Brown
21 ART BROWN, Chairman

22 (See attached opinion)

23 ROBERT E. BEATY, Member

24 W. A. Gissberg
25 W. A. GISSBERG, Member

26 (See attached opinion)

27 CHRIS SMITH, Member

3 Howard L. Stolaas
4 HOWARD L. STOLAAS, Member

5 Robert F. Hintz
6 ROBERT F. HINTZ, Member

7 FINDINGS OF FACT,
8 CONCLUSIONS OF LAW

SMITH, Chris--I concur in part (Conclusions of Law I, II, III, IV, VI, VII and VIII and dissent in part (Conclusion of Law V, and Order), and would add or substitute the following:

CONCLUSION OF LAW

V

1. Access Road

Despite affirming the major elements of the project, I am convinced that the City erred in approving the filling of the southern end of East Bay to provide a traffic access to and from the harbor peninsula. Although the acreage at issue (approximately one acre) is minimal and the aesthetics of the shoreline will be improved by the fill, the City's rationale for the route, diverting heavy truck traffic from the downtown area, does not justify the elimination of this water area, significant both in terms of view and habitat.

2. Slope Protection

No evidence was presented at the hearing, or was to be found in the record, to support the presumption that a 4 m.p.h. speed limit could be maintained. The only comment on the subject was the Coast Guard's disavowal of responsibility for enforcement of this requirement (see FEIS: USCG letter). I am therefore unable to accept the soils consultant's reliance on this condition to justify waiving the full slope protection requirement. (See EIS: Sec. E, Dames & Moore Soils Investigation, p. 7).

3. Covered Moorage

The substantial development permit authorizes a moorage basin for 800 boats. Although there is general reference to the Port's inter

1 to cover one-half of the moorages, there are no site plans or detail
2 drawings indicating the location of such structures. Exhibit RP-2, an
3 artist's rendering superimposed on a photograph of the site, provides
4 the only opportunity to evaluate the visual and environmental impact of
5 such structures. Although a precise calculation of the number of moorages
6 is impossible, it would appear to be between one-quarter and one-third
7 of the slips shown.

8 ORDER

9 That portion of the substantial development permit issued by the
10 City of Olympia which authorized the filling of the southerly end of
11 East Bay with approximately one acre of fill is vacated. In all other
12 respects, the final decision of the City of Olympia granting a
13 substantial development permit to the Port of Olympia, with conditions,
14 is affirmed subject to the following additional conditions:

15 1. The Port of Olympia is to require in its leases for moorage
16 slips that a boat must be in conformity with the U. S. Coast Guard or
17 Environmental Protection Agency or Department of Ecology rules with
18 respect to waste disposal facilities.

19 2. Full slope protection shall be provided for all cut and fill
20 areas potentially subject to erosion from tidal runout, channelized
21 runoff, boat wakes, or artesian flow.

22 3. The maximum number of covered moorages shall be consistent with
23 the number delineated on Exhibit RP-2.

24 The permit is remanded to the City of Olympia for action
25 consistent with this Order.

6
27 FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER


CHRIS SMITH, Member

I concur


ROBERT E. BEATY, Member

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

P.R.O.W. (Protecting and Restoring
our Waterfront), and WASHINGTON
ENVIRONMENTAL COUNCIL,

Appellants,

v.

PORT OF OLYMPIA, STATE OF
WASHINGTON, DEPARTMENT OF FISHERIES,
DEPARTMENT OF GAME and
DEPARTMENT OF ECOLOGY,

Respondents.

PCHB No. 1032

ECPA No. 5

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

FINDINGS OF FACT

I

Pursuant to WAC 173-08-030,¹⁰ a final decision was rendered by
the State Departments of Fisheries and Game responsive to the instant
ECPA master application filed on November 7, 1974.

10. WAC 173-08-030 DEFINITIONS . . . (4) "Permit" means . . .
Department of Fisheries . . . Hydraulic Project Approval.

1 The decision dated April 29, 1976, granted Hydraulic Project
2 Approval pursuant to RCW 75.20.100, subject to six detailed conditions:

3 1. No dredging for the entrance channel or moorage area
4 may occur unless assurances are made that all sewage
5 entering Olympia Harbor is within 12 months of
6 achieving secondary treatment as shown on your
7 attached bar graph. It would be highly desirable to
all concerned if the period of major dredging be
compressed to within 6 months of improved sewage
treatment. We may pursue the 6-month goal as detailed
plans for the marina become available.

8 a. The Port of Olympia will supply written status
9 reports at 3-month intervals to these depart-
ments on the progress, or lack of, on the
sewage treatment improvements.

10 b. All construction involving waterways in
11 East Bay shall immediately cease if any
12 delays occur affecting the completion
date for secondary sewage treatment.

13 2. During the entire marina construction period, agreed on
14 mechanical flushing devices shall be available to insure
15 maintenance of water quality in East Bay acceptable to
16 salmonid survival. In the event water quality
17 deteriorates below that for salmonids to survive, the
18 mechanical flushing devices will be operated and all
work in the waterways in East Bay shall cease until
conditions improve. These departments will determine
the minimum water quality standards acceptable for
salmonid survival.

19 3. No boat moorage will be permitted prior to secondary
sewage treatment completion.

20 4. Permanent approved mechanical flushing devices shall be
21 provided to exchange the entire volume of East Bay every
22 tide cycle if water quality fails to meet Class B
standards, or better, following completion of the marina
and the secondary sewage treatment plant.

23 5. Storm water runoff will be controlled to prevent any
24 changes in water quality in East Bay.

25 6. These departments reserve the right to make changes,
26 deletions, or additions to these provisions as
additional information dictates for protection of
the resources under their jurisdictions.

27 FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

II

The Department of Ecology in responding to the instant ECPA master application, granted Sewage and Industrial Waste Treatment Facilities Approval (RCW 90.48.110) and a Waste Discharge Permit (RCW 90.48.180).

Approval is subject to satisfactory compliance with the following conditions:

1. Plans for dredging operations (schedule, disposal area design, outlet weir, etc.);
2. Plans for parking lot storm drainage pollution control;
3. Plans for cargo yard storm drainage;
4. Plans for holding tank pumpout and sewer system;
5. Oil Spill Prevention, Control and Countermeasure plan;
6. The Corps' study and related water quality information.

III

A draft Environmental Impact Statement for the proposed East Bay Marina Development was completed and circulated on August 27, 1974. The final EIS was prepared and distributed on February 28, 1975.

IV

Appellants in this matter object to the granting of approvals prior to satisfaction of the listed conditions.

V

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Findings the Pollution Control Hearings Board comes to these

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

CONCLUSIONS OF LAW

I

For its standards of review, the Environmental Coordination Procedures Act incorporates by reference the provisions of RCW 34.04.130(6):

The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order; or
- (f) arbitrary or capricious.

The granting of the hydraulic permit, the sewage facilities approval, and the waste discharge permit by the respective state agencies did not violate constitutional provisions, exceed statutory authority, or result from unlawful procedure. Nor does the record support a conclusion that the agencies acted arbitrarily or capriciously in approving the project as conditioned.

To reverse the decisions of the state agencies therefore, the Pollution Control Hearings Board must find that their decisions were "clearly erroneous" in view of the record established and the respective authorizing statutes.

The clearly erroneous standard, as repeatedly stated by the Washington Courts, requires that the reviewing court, herein the Pollution Control Hearings Board, be left with the definite and firm

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

conviction that a mistake has been made, despite there being evidence in the record to support the challenged administrative decision.

II

Upon such review and consideration of applicable statutes, the Pollution Control Hearings Board is not convinced that the state agencies erred in issuing their respective permits and affirms the final decisions rendered in this matter by the Departments of Fisheries and Game and the Department of Ecology.

III

Appellants assert that numbered condition 4 of the Hydraulic Permit is defective in that there is no indication who is to approve the permanent mechanical flushing devices. It is clear to us that such approval responsibility is with the Department of Fisheries. In addition, we point out to the Port and Departments of Fisheries and Game, that the "assurances" required by condition 1 of the permit must be concurred in by the Departments. Before the Port may commence dredging both Departments must be convinced that secondary sewage treatment will be a reality within 12 months.

IV

The Environmental Impact Statement prepared for this proposal was adequate in quantity and quality to meet the need of a decision maker to inform himself of the environmental impacts of the proposed action.

V

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

Therefore, the Pollution Control Hearings Board issues this

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

ORDER

The final decisions of the Departments of Fisheries and Game and the Department of Ecology rendered responsive to the ECPA master application in this matter are affirmed subject to our interpretation of it contained in Conclusion of Law III.

DATED this 21st day of January, 1977.

POLLUTION CONTROL HEARINGS BOARD

Art Brown
ART BROWN, Chairman

W. A. Gissberg
W. A. GISSBERG, Member

Chris Smith
CHRIS SMITH, Chairman

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER